Office - Supreme Court, U.S.
FILED
SEP 12 1941

Supreme Court of the United States

OCTOBER TERM, 1941

No. 266

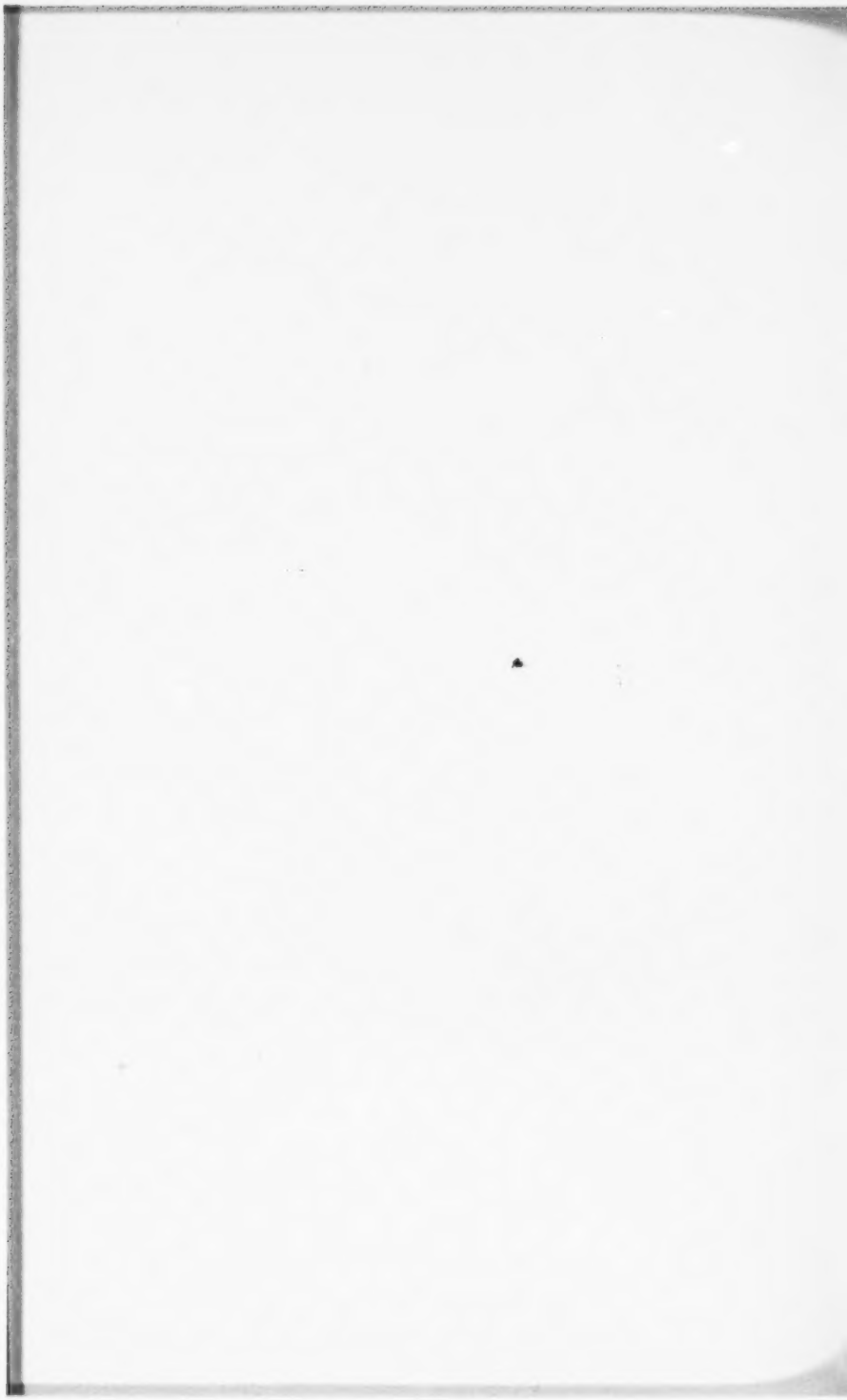
In the Matter
of
GEORGE A. CARDEN,
Bankrupt.

McCLAVE & COMPANY,
Petitioners,

GEORGE A. CARDEN, DANIEL LOEB and
Petitioning Creditors,
Appellees.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SAMUEL C. DUBERSTEIN,
Attorney for Petitioners.



INDEX.

PAGE

Statement 1

I—The character of the defect in the purported bankruptcy petition..... 2

II—The validity of petitioners' judgment and of their title thereto..... 3

III—The question of legislative power as distinct from that of legislative intent..... 4

IV—The ethics of petitioners' position..... 5

CASE CITED.

Securities and Exchange Com'n. v. U. S. R. & Imp. Co., 310 U. S. 434..... 4

Supreme Court of the United States

OCTOBER TERM, 1941

No. 266

In the Matter

of

GEORGE A. CARDEN,

Bankrupt.

McCLAVE & COMPANY,

Petitioners,

GEORGE A. CARDEN, DANIEL LOEB and Petitioning Creditors,

Appellees.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Statement.

Respondents' brief invites a clarification of four aspects:

I. The character of the defect in the purported bankruptcy petition.

II. The validity of petitioners' judgment and of their title thereto.

III. The question of legislative power as distinct from that of legislative intent.

IV. The ethics of petitioners' position.

We shall consider these four aspects *seriatim*.

I.

The character of the defect in the purported bankruptcy petition.

Respondents' brief treats the defect in the purported petition as, variously, a defect of form or of pleading or as an irregularity with respect to the verification. Any such defect, it is then argued, was curable by the bankrupt's default and could not be treated as jurisdictional.

The answer to this contention is implicit in the statement in respondents' brief (p. 5, last three lines) to the effect that jurisdiction is satisfied in the presence of a petition in bankruptcy "containing the essential allegations". The purported petition in this case did not contain the essential allegations. The recital in the printed form of the occurrence of an act of bankruptcy "within four months preceding the filing of this petition" was conclusively falsified by that portion of the same paper which established that it had been verified more than a year before the filing. The verification date established, as a simple physical fact which the courts must recognize, that the act of bankruptcy to which it referred could not have taken place within four months preceding the filing. So that, even by the test referred to in respondents' own brief, this purported petition was jurisdictionally defective by reason of its omission of an essential allegation. In the absence of that essential allegation, the piece of paper was not a petition in bankruptcy at all, however solemn its aspiration to be one. A piece of paper which fails to refer to the occurrence of an act of bankruptcy within four months next preceding the date of its filing, or which reveals within its four corners that it could not have been referring to an act of bankruptcy so occurring, cannot be an involuntary bankruptcy petition at all. The absence of part of the essential nucleus sterilizes it. It could no more be a petition in involuntary bankruptcy than could be (say) a rebus puzzle.

II.

The validity of petitioners' judgment and of their title thereto.

We shall consider the validity of petitioners' judgment and the validity of their title thereto as two separate aspects.

Respondents' brief claims that petitioners' judgment was "on a promissory note given for a moral, but not legal consideration" (Respondents' Brief, p. 2, l. 16-17). The sole basis advanced for that characterization is the fact that when suit was brought upon the note more than six years after it had been executed, the maker defaulted (p. 18). No attempt of any kind has ever been made to question the consideration given for the note itself. Respondents have contented themselves with seeking to generate an atmosphere of suspicion from the circumstance of the maker's default in a situation wherein a plea of the statute of limitations might appear to have been legally available. Clearly, however, there can be neither impropriety nor basis for suspicion in the bankrupt's failure to have pleaded a technical defense in the absence of any evidence impugning either the propriety of the note itself or of the consideration given therefor.

Respondents' attack upon petitioners' title to their judgment rests in the claim that they had purchased it for $100.00 (Respondents' Brief, pp. 2, 3). The record reveals that the judgment had been purchased by petitioners at a publicly advertised receiver's sale held pursuant to a judgment which they had obtained against its previous owner; that petitioners, as plaintiffs in that suit, had had a prior lien of $60,000 against the proceeds from the sale of the judgment; and that, in the absence of any other bidders at the sale, petitioners had purchased it themselves, paying $100.00 rather than $60,000 for tax reasons (pp. 22-3).

The record shows that the validity of petitioners' purchase of this judgment was contemporaneously challenged, but was confirmed by order of the Supreme Court, New York County (pp. 23-4). The order confirming the sale of the judgment to these petitioners was thereafter affirmed by the Appellate Division, First Department, since the entry of the order by the District Court.

Petitioners might have rested simply upon the *prima facie* validity of their judgment and of their title therein—particularly in view of the fact that both have received confirmation from the courts of New York State. They have chosen, however, to set forth the facts as to both in order that the baseless character of respondents' attack might the more clearly be revealed.

III.

The question of legislative power as distinct from that of legislative intent.

We have already shown that the provisions of the Chandler Act must be understood in the light of the knowledge of Congress that it had always been the practice of bankruptcy courts to vacate petitions, on motion by others than those specifically authorized, either for jurisdictional defect or in the presence of some good reason why "the proceedings ought not to be allowed to proceed." *Securities & Exch. Com'n. v. U. S. R. & Imp. Co.*, 310 U. S. 434, 457-8. So viewed, it is most reasonable to assume that Congress had intended the provisions of the new Act to be subject to the same reservoir of judicial power.

Yet let us now, for the sake of this argument, assume the contrary. Let us even assume that it had been the intention of the Congress retroactively to destroy the creditor's power to vacate a petition of this kind even in a situation in which the petition had been filed under the old

Bankruptcy Act. Clearly, even such an assumption could not exhaust the problems which would then confront us. For, beyond the question of legislative intent, would arise the question of legislative power. The courts would still have to decide whether, assuming the intention of the Congress to have been as claimed, it would be practicable and constitutional to permit the provisions of the new Act, operating retroactively, to destroy the effective remedy upon the exercise of which a priority vesting under the old Act had depended.

We have limited ourselves at this point to indicating the extent to which we have a question of Congressional power along with the more obvious one of Congressional intent. The reasons why that question of power should be resolved in the manner for which petitioners have herein been contending will appear more fully from the subdivision of this brief which immediately follows.

IV.

The ethics of petitioners' position.

Respondents' brief argues that there is a kind of public policy in bankruptcy courts in favor of equality of distribution among creditors. But while the doctrine referred to has often been stated in some such manner, it is wanting in precision in the very respect in which precision is here essential. The true doctrine is that bankruptcy courts favor equality among creditors *of the same class*. Unless the italicized language be incorporated within the statement of the rule, the solicitude of both Bankruptcy Acts for the protection of legal priorities would be altogether unintelligible. In other words, it has always been the policy of the Bankruptcy Acts, both old and new, that legal preferences are held in as great respect as illegal preferences are held in disrespect. Applying this doctrine to the in-

stant case, it must be clear that, insofar as these petitioners have acquired a vested priority by the extension of the state court receivership to their judgment, their prior lien must be indestructible to any attack save one instituted in a legal manner.

In a sense this is the focal point of this controversy. If the general policy of equal distribution among creditors is to be carried to the point at which it involves the "rough-shod" obliteration of vested priorities, then, of course, any means employed will partake of the sanctity of the objective. In that case, these petitioners could not be heard to complain about the expropriation of their lien under the state court receivership. But if, on the other hand, the Chandler Act is not to be interpreted or applied as destructive of all legal liens and priorities, proceedings taken to the end of destroying such liens must be carefully analysed. Clearly, such proceedings may not ignore fundamental jurisdictional requirements. Clearly, also, they may not be permitted to invoke the provisions of a later statute in order retroactively to sterilize the remedy which had existed under the statute pursuant to which the petition itself had been filed and without which the substantive right itself must fall.

In other words, unless the validity of legal priorities is to be denied altogether, a bankruptcy petition must be, both, jurisdictionally sufficient and subject to the methods of challenge which are in force on the date of its filing.

Respectfully submitted,

SAMUEL C. DUBEESTEIN,
Attorneys for Petitioners.